1987

Steven D. Crowther v. Murlan D. Carter : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STEVEN D. CROWTHER, Trustee for COMPUTER SERVICE OF SOUTHERN UTAH PENSION TRUST, Plaintiff-Respondent, vs. MURLAN D. CARTER, Defendant-Appellant.	Case No. 870524-CA Classification Priority 14b

BRIEF OF RESPONDENT

Appeal from a Judgment of the Fifth Judicial District Court in and for Iron County, State of Utah, the Honorable Robert F. Owens, District Judge by Appointment, presiding, ordering the dissolution of a partnership and allowing a redemption right for the General Partner.

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JURISDICTION AND NATURE OF THE PROCEEDINGS

The jurisdiction of the Court of Appeals in this matter is by virtue of the "pour-over" authority of the Supreme Court of Utah and that Court's order in its case number 870350. This is an appeal from a judgment of the Fifth District Court of Iron County which dissolved a limited partnership and established certain redemption rights in behalf of the general partner.

STATEMENT OF THE ISSUES

1. Did the trial court err when it determined that the Limited Partnership Agreement between the parties was unambiguous as that Agreement defined "initial" and "additional" capital

contributions to be made by the limited partner?

2. Did the trial court err in refusing to admit the proferred testimony of the Defendant-Appellant's "expert" accountant relating to the Defendant-Appellant's interpretation of the limited partnership agreement?

3. Did the trial court err when it found that the Appellant had willfully breached the Limited Partnership Agreement?

4. Did the trial court err when it granted the Plaintiff-Appellant's request to order the dissolution of the partnership.

5. Did the trial court err in setting the interest rate on the reacquisition cost at 1.5 percent over the State Bank of Southern Utah prime lending rate?

6. Did the trial court err in setting aside the Trust Deed and Note executed by the Defendant and construing the dispute solely within the framework of the Partnership Agreement?

7. Should this appeal be dismissed for failure to file a Supersedeas Bond?

DETERMINATIVE STATUTES

48-2-10. U.C.A., 1953, AS AMENDED. RIGHTS OF A LIMITED PARTNER.

(1) A limited partner shall have the same rights as a general partner to:

(a) Have the partnership books kept at the principal place of business of the partnership, and at all times

to inspect and copy any of them;

(b) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable; and,

(c) Have dissolution and winding up by decree of court.

(2) A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in sections 48-2-15 and 48-2-16.

48-2-13. U.C.A., 1953, AS AMENDED. LOANS AND OTHER BUSINESS TRANSACTIONS BETWEEN PARTNERSHIP AND LIMITED PARTNER.

(1) A limited partner also may lend money to, and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a prorata share of the assets. If, at the time of receipt, the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners, no limited partner shall in respect to any such claim;

(a) Receive as collateral security any partnership property or,

(b) Receive from a general partner or the partnership any payment, conveyance, or release from liability.

(2) Without prior written full disclosure to all

limited partners of the terms and the collateral involved in a proposed loan by a limited partner, no limited partner shall make a loan upon the security of the partnership property if, at the time such loan is made, the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners.

(3) The making of a secured loan, or the receiving of collateral security, or a payment, conveyance or release in violation of the provisions of subsection (1) or (2) is a fraud on the creditors of the partnership.

STATEMENT OF THE CASE

The Plaintiff-Respondent has had possession of the assets of the partnership since June 1, 1985, under the ruling of the trial court at that time. Pursuant to the ruling of the trial court at that time and the later Decree of Dissolution and Judgment, the Plaintiff-Respondent has been operating the Mobile Home Park and R.V. Park and keeping the books and records thereof pending a final "winding up" of the partnership's affairs. There has yet to be the final Judgment of the trial court relating to the accounting of the "winding up" of the partnership affairs. This final Judgment is required to fix the reacquisition costs to the Defendant-Appellant should he attempt to exercise his rights to reacquire the property under the terms of the Partnership Agreement.

The Plaintiff-Respondent has always taken the position that he was entitled to full ownership of the major asset of the partnership, the Mobile Home Park and R.V. Park, under the terms of the Trust Deed and Trust Deed Note which was executed on May 23, 1983. The trial court, however, set aside the Trust Deed and Trust Deed Note and determined that the provisions of the Limited Partnership Agreement should govern the relationship between the general and limited partners and, after a series of hearings, entered the final Decree of Dissolution and Judgment on May 20, 1987.

SUMMARY OF ARGUMENT

1. The Limited Partnership Agreement is not ambiguous in making the distinction between initial capital contributions and additional capital contributions to be made by the Plaintiff-Respondent.

2. The trial court committed no error in refusing to permit opinion evidence from a certified public accountant. There was no foundation to support the receipt of expert evidence from the proferred witness.

3. The Defendant-Appellant willfully breached the Partnership Agreement and the trial court's finding to that effect is well founded within the record.

4. The trial court's determination that the partnership should be dissolved was founded not only upon the

acquisition of more than 100% of the partnership assets by the Plaintiff-Respondent, but was also founded upon the breach of the Partnership Agreement by the Defendant-Appellant.

5. There was adequate support in the record for a determination that the interest rate on the reacquisition cost should be 1.5 percent over State Bank of Southern Utah's prime lending rate.

6. The trial court could have enforced, and this court should now enforce, the terms of the Trust Deed and Trust Deed Note in order to eliminate all accounting and "wind up" problems in this case.

7. This appeal should be dismissed for the reason that the Defendant-Appellant has failed to file a supersedeas bond.

ARGUMENT

I

THE LIMITED PARTNERSHIP AGREEMENT IS NOT AMBIGUOUS IN MAKING THE DISTINCTION BETWEEN INITIAL CAPITAL CONTRIBUTIONS AND ADDITIONAL CAPITAL CONTRIBUTIONS TO BE MADE BY THE PLAINTIFF-RESPONDENT.

A reading of the Limited Partnership Agreement easily supports the finding of the trial court that the Agreement's terms were unambiguous. The pertinent paragraph 6 is quoted hereafter:

> 6. CAPITAL CONTRIBUTIONS OF THE LIMITED PARTNER. The LIMITED PARTNER hereby agrees to make initial capital contributions to the PARTNERSHIP as follows:
>
> A. To pay off a certain 2nd Trust Deed presently of record against certain property located at 966-988 West 400 North, Cedar City,

Iron County, Utah, said property being a six (6) plex apartment building owned by the LIMITED PARTNER, the 2nd Trust Deed evidences a debt of approximately SEVENTEEN THOUSAND DOLLARS $17,000.00 owed by the GENERAL PARTNER to the Stratton Brothers Cattle Company as a result of a previous law suit.

B. To use his best efforts to substitute himself in place of the Country Aire Estates, a California Limited Partnership, on a 1st Trust Deed Note between Country Aire Estates and First Security Bank in Cedar City, Iron County, Utah, which 1st Trust Deed Note covers the real property described under paragraph 5 above.

C. To use his best reasonable efforts to obtain a Letter of Credit or other bond or security as required by Cedar City Corporation to allow the development of the above-described property as a planned unit development in accordance with plans already preliminarily approved by Cedar City Corporation and to pay whatever expenses are attendent upon said bond, Letter of Credit, or other security.

LIMITED PARTNER also agrees to contribute additional cash or property as capital for the use of the PARTNERSHIP for the following purposes, should the GENERAL PARTNER request said contribution:

A. Payment of the amount due on an unrecorded Real Estate Contract with a present balance of approximately NINETY FIVE THOUSAND FIVE HUNDRED ($95,500.00) which Contract covers the sale of the real property described in paragraph 5 hereof from Country Aire Estates, a California Limited Partnership, to MURLAN D. CARTER, the GENERAL PARTNER herein, which contract bears payments of TWELVE HUNDRED AND NINE DOLLARS AND THIRTY EIGHT CENTS ($1,209.38) per month with the entire balance due in 1983. The payment of this Contract obligation will discharge any purchase money obligation owing against the property described in paragraph 5 hereinabove by paying off the unrecorded Real Estate Contract and the 1st Trust Deed Note described in paragraph 6 (B) above.

B. Approximately SEVEN THOUSAND DOLLARS ($7,000.00) back taxes due and payable to the County of Iron, State of Utah.

C. Approximately FIFTEEN THOUSAND DOLLARS ($15,000.00) claimed by Eckhoff, Watson, and Preator, Engineers of Cedar City, Utah, for

work allegedly done on the above-described real property and for which a Mechanic's Lien has been filed and a law suit is in progress to foreclose the Lien and collect the amount due.

D. Approximately FIVE THOUSAND ($5,000.00) for the Cedar City Sewer Improvement District for sewer work in relation to the above-referenced property.

E. Such other and further expenses as may arise during the development of the project.

It is the intention of the GENERAL PARTNER and the LIMITED PARTNER to this Agreement, that in return for LIMITED PARTNER'S initial investment of SEVENTEEN THOUSAND DOLLARS ($17,000.00) and his attempts to substitute himself in place of Country Aire Estates, a California Limited Partnership, on a 1st Trust Deed Note with First Security Bank, and his best effort to provide a Letter of Credit or other bond or security to finance the developments to the above-described real property; the LIMITED PARTNER shall have and hereby is given a twenty percent (20%) ownership interest in the real property and project described above. Further, in the event that LIMITED PARTNER is required to contribute any more cash to the development of the project, LIMITED PARTNER shall receive one (1) additional percentage point of ownership interest for each ONE THOUSAND DOLLARS ($1,000.00) of additional cash which he contributes to the project. Fractions of ONE THOUSAND DOLLAR ($1,000.00) contributions will buy LIMITED PARTNER an equal fraction of ownership.

It is further agreed between the parties that GENERAL PARTNER can reduce or eliminate LIMITED PARTNER'S ownership interest in the above-described real estate and project by paying to the LIMITED PARTNER, any time within five (5) years of the particular contribution by LIMITED PARTNER, all or part of the LIMITED PARTNER'S total contribution, which interest is to be calculated quarterly at one and one-half percent (1 and 1/2%) above the prime interest rate. In the event that GENERAL PARTNER pays off the entire contribution plus interest as calculated above, then LIMITED PARTNER shall be eliminated from this project and shall have no further claim upon the project. In the event that GENERAL PARTNER pays only a portion of LIMITED PARTNER'S investment, then LIMITED PARTNER'S interest

shall be reduced one percent (1%) for every ONE THOUSAND DOLLARS ($1,000.00) of LIMITED PARTNER's contribution repaid over and above LIMITED PARTNER's initial contribution as set forth hereinabove in paragraph 6. Repayment of all or part of LIMITED PARTNER's initial contribution shall be made in the same fashion as repayment of the LIMITED PARTNER's additional contributions, that is ONE THOUSAND DOLLARS ($1,000.00) plus interest repaid to LIMITED PARTNER will reduce LIMITED PARTNER's ownership interest by 1 percent (1%).

In the event that GENERAL PARTNER sells any portion of the above-described real estate in any fashion whatsoever within five (5) years after any contribution by the LIMITED PARTNER as set forth hereinabove, and the GENERAL PARTNER does not within ninety six (96) hours after receiving the cash in hand apply those entire profits from said sale to paying off the LIMITED PARTNER's investment herein, or applies only a portion of said profits to paying off the LIMITED PARTNER's investment herein, then the amount of profits not so applied or any profits received after the five (5) year period will be divided between GENERAL PARTNER and LIMITED PARTNER in the same percentages as the percentage of ownership in said project held by GENERAL PARTNER and LIMITED PARTNER at a time 48 hours after GENERAL PARTNER receives said profits as cash in hand.

The GENERAL PARTNER shall not encumber the property described in paragraph 5 hereinabove without the prior written consent of the LIMITED PARTNER. The GENERAL PARTNER shall notify the LIMITED PARTNER in writing five (5) days before the sale of the property described in paragraph 5 hereinabove of his intention to sell the property. If the LIMITED PARTNER disagrees with any term of the sale or with the sale itself, he must within five (5) days after receiving notice of the GENERAL PARTNER's intent to sell, file with the GENERAL PARTNER his objection in writing to the sale. In the event that the GENERAL PARTNER and the LIMITED PARTNER cannot agree on the arrangements for the sale of any portion of the real property described in paragraph 5 hereinabove, both parties hereby agree that the dispute shall be submitted to J. Philip Eves, Attorney at Law, 110 North Main Street, Suite H., Cedar City, Utah 84720, to act as arbitrator, or

> such other person as J. Philip Eves shall appoint. In the event that J. Philip Eves fails or refuses to act as arbitrator or to appoint someone else to act in the capacity, the PARTNERS shall select another person upon whom they can both agree to act in that capacity. The decision of the arbitrator shall be binding on both parties.

The above-quoted portion of the Limited Partnership Agreement is clearly delineated into two categories of contributions to the partnership. First there is the initial capital contribution payment of approximately $17,000.00 on the six plex apartment building, then to use his best efforts to substitute himself in the place of Country Aire Estates on a 1st Trust Deed Note with First Security Bank, and finally to use his best efforts to obtain a Letter of Credit or bond required by Cedar City Corporation for development of the Mobile Home Park property. The Limited Partner then would obtain additional interest in the limited partnership by paying, in 1983, the entire balance of the Trust Deed Note with First Security Bank, plus back taxes, plus a $15,00.00 Mechanic's Lien, plus $5,000.00 to Cedar City Corporation and other development costs. The initial contributions entitled the Plaintiff-Respondent to twenty percent (20%) of the partnership. The additional contributions gave the Plaintiff-Respondent one percent (1%) per $1,000.00 of contribution giving the Plaintiff-Respondent more than one hundred percent (100%) of the ownership of the agreement.

II

THE TRIAL COURT COMMITTED NO ERROR IN REFUSING TO

PERMIT OPINION EVIDENCE FROM A CERTIFIED PUBLIC ACCOUNTANT. THERE WAS NO FOUNDATION TO SUPPORT THE RECEIPT OF EXPERT EVIDENCE FROM THE PROFERRED WITNESS.

While the Defendant-Appellant has failed to cite to the recprd the proffered testimony, the Plaintiff-Respondent believes that the proferred testimony of Mr. Claude Slack of Cedar City (T. 144-147) is the area of concern. The proferred testimony was:

> Mr. Burns: We intend to prove, your Honor, that under the terms of the Limited Partnership and general usage of that accounting, that it would be wholly and totally unreasonable for anyone to ever have 122 percent of the limited partnership, but it would be most reasonable to have 20 percent of a limited partnership given the contributions of Mr. Crowther, under general accounting principles.

The trial court found that the proferred testimony would "be a conclusion that would be invading the province of the trier of fact." (T. 146) No further proffer exists within the record establishing the expertise of the proposed witness other than his receipt of a bachelor's degree in accounting and the fact that he was a certified public accountant.

There is insufficient proffer or other evidence within the record to establish the expertise of the witness, his degree of familiarity with the necessary facts, and the logical nexus between his opinion and the facts adduced. (Edwards v.Didericksen, 597 P.2d 1328 [Utah 1979])

Even if the exclusion of this testimony by the trial court was error, the interpretation of the contract towards which the testimony was directed would make such error harmless.

III

THE DEFENDANT-APPELLANT WILLFULLY BREACHED THE PARTNERSHIP AGREEMENT AND THE TRIAL COURT'S FINDING TO THAT EFFECT IS WELL FOUNDED WITHIN THE RECORD.

The trial court was well within its perogatives when it determined that the Defendant-Appellant had willfully breached the Partnership Agreement. The Defendant-Appellant had used partnership funds to put tires on a vehicle not owned by the partnership and used by the Defendant-Appellant for his own personal use. The Defendant-Appellant had paid his wife a salary from partnership funds, when he himself was prohibited from taking such a salary, and no notice was ever given to the Plaintiff-Respondent of this process. Defendant-Appellant had paid for his own real estate license from partnership funds. The Defendant-Appellant never deeded the partnership property to the partnership but kept it in his own name.

A review of the entire record and the accounting of the Defendant-Appellant shows that he did not comply with the requirements of the Partnership Agreement.

IV

THE TRIAL COURT'S DETERMINATION THAT THE PARTNERSHIP SHOULD BE DISSOLVED WAS FOUNDED NOT ONLY UPON THE ACQUISITION OF MORE THAN 100 PERCENT OF THE PARTNERSHIP ASSETS BY THE PLAINTIFF-RESPONDENT, BUT WAS ALSO FOUNDED UPON THE BREACH OF THE PARTNERSHIP AGREEMENT BY THE DEFENDANT-APPELLANT.

The statement of the trial court at page 200 of the trial transcript gives the Court's reasoning very clearly:

> The significance of that is that if I find that the partnership still exists, it is in a sense no longer a partnership because the plaintiff would own 125 percent of it. The defendant, and this wouldn't necessarily dissolve -- well, it would dissolve the partnership, but there would be contractual rights that would -- residual rights in the nature of rights to redeem, which the defendant would still own, which would differ somewhat from rights to redeem under the trust deed foreclosure and there may be some other significant things that I haven't thought through.

The court's reasoning for this determination is by a clear reading of the Partnership Agreement. The dissolution of the partnership is supported by the Plaintiff-Respondent's total ownership of the assets of the partnership and the actions of the Defendant-Appellant as a predator upon those assets. The total ownership of the assets is dealt with in the reading of the Partnership Agreement as set forth in Argument I above. The record well supports and the court reasonably found that the Plaintiff-Respondent was entitled to 20 percent of the partnership assets upon his initial contributions, and upon the discharge of the $95,000.00 1st Deed of Trust at First Security Bank acquired over 100 percent of the partnership. The court construed the Trust Deed Note and Trust Deed executed on May 23, 1983, as additional security for the Partnership Agreement, rather than a transaction superceding the Partnership Agreement. At that point, the Limited Partner had the total ownership of the partnership interest and certainly had the right to request that

the court order the partnership dissolved, which the court did. (48-2-10, Utah Code Annotated, 1953, as amended)

The court also was well founded in determining that the General Partner had breached the Partnership Agreement by the manner in which the General Partner dealt with the books and records of the partnership and with partnership funds. The court heard testimony and saw other evidence that the Defendant-Appellant had paid a managerial salary to his wife out of partnership profits (T. 72), had purchased tires for a vehicle when the partnership did not own a vehicle (T. 69-70), and purchased his own real estate license (T. 73). All of these items have been accounted for in the general ledger of the partnership which was admitted into evidence as Exhibit P-13. On these grounds the court was well supported granting the Plaintiff-Respondent's request to dissolve the partnership.

V

THERE WAS ADEQUATE SUPPORT IN THE RECORD FOR A DETERMINATION THAT THE INTEREST RATE ON THE REACQUISITION COST SHOULD BE 1.5 PERCENT OVER STATE BANK OF SOUTHERN UTAH'S PRIME LENDING RATE.

The court adopted the proposed Findings of Fact submitted by the Plaintiff-Respondent as is indicated at page 278 of the record. The Plaintiff-Respondent had submitted proposed Findings that tied the interest rate for reacquisition costs to the prime lending rate of State Bank of Southern Utah, a bank located in Cedar City, the residence of both Plaintiff-Respondent and Defendant-Appellant. The proposed language of the

Defendant-Appellant used "New York prime lending rate" which is an indefinite and unusable standard. The minute entry of June 11, 1985, (R. 206) fixes the interest at 1 and 1/2 percent over prime rate. This reflects the same language referred to in paragraph 6 of the Partnership Agreement as quoted above in this brief. The undersigned recalls that at the time of the June 11, 1985, hearing, the Defendant-Appellant agreed to use State Bank of Southern Utah as the institution upon which to base the prime rate figure. However, there is no transcript of that hearing in the record so it must be presumed that the court's finding is correct.

VI

THE TRIAL COURT COULD HAVE ENFORCED, AND THIS COURT SHOULD NOW ENFORCE, THE TERMS OF THE TRUST DEED AND TRUST DEED NOTE IN ORDER TO ELIMINATE ALL ACCOUNTING AND "WIND UP" PROBLEMS IN THIS CASE.

The Complaint in this case originally sought the foreclosure as a mortgage of the Trust Deed and Trust Deed Note executed by the Defendant-Appellant on May 23, 1983. If a Judgment and Decree of Foreclosure were granted by this Court, the Plaintiff-Respondent would assume all of the ownership interests in the Mobile Home Park and R.V. Park as his sole remedy. There would be no issue of the "wind up" of partnership affairs or any claim for accounting after May 23, 1983, in this action. This remedy is clearly contemplated by the legislature in the statutory provision of 48-2-13, Utah Code Annotated, 1953,

as amended. This position was argued to the trial court. (T. 193)

VII

THIS APPEAL SHOULD BE DISMISSED FOR THE REASON THAT THE DEFENDANT-APPELLANT HAS FAILED TO FILE A SUPERSEDEAS BOND.

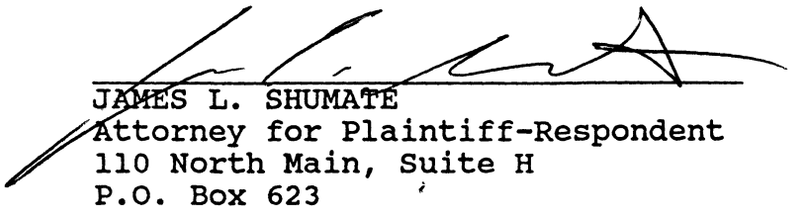
Rule 8 of the Rules of the Utah Court of Appeals provides for a stay of the Judgment of a District Court only upon a Motion to the District Court from which the appeal is taken. No such Motion has been made in this case, nor has any appropriate bond been filed as is contemplated by Rule 8. Without a stay order and the filing of the bond, which would be demanded by Plaintiff-Respondent, the property which is the sole asset of the partnership, will be sold at a Sheriff's Sale on May 23, 1988. The likelihood of this appeal reaching a resolution by that date is slight. The Defendant-Appellant has taken no action to forestall the Sheriff's Sale and such a sale would render all issues in this appeal moot. Because of this failure on the part of the Defendant-Appellant, his appeal should be dismissed forthwith.

CONCLUSION

The Plaintiff-Respondent respectfully requests this Court to dismiss the appeal forthwith. Should the Court decline such a dismissal, the Plaintiff-Respondent requests that the Trust Deed and Trust Deed Note be foreclosed as a Note and

Mortgage immediately. Alternately, the Plaintiff-Respondent requests that the Decree of Dissolution and Judgment be affirmed.

Respectfully submitted this 12th day of December, 1987.



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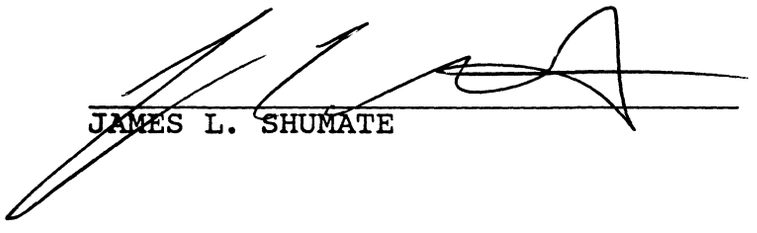
MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing BRIEF OF RESPONDENT to G. Michael Westfall, Gallian & Westfall, Dixie State Bank Building, One South Main Street, P.O. Box 367, St. George, Utah 84770, this 12th day of December, 1987, first class postage prepaid.



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